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No. 79-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Amoco Production Company (Amoco) hereby replies to the "Brief for the Federal Energy Regulatory Commission In Opposition" filed on or about December 4, 1979.

ARGUMENT

I. *The Seatrain Doctrine.* The Commission first argues that *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), is not applicable (FERC Br., p. 12). The argument is specious and not in accord with reality.

1. The Court of Appeals recognized that ". . . imposition of conditions on Amoco's applications for additional certificates undoubtedly affects the manner in which Amoco would thereafter be able to meet its warranty

contracts . . . ." (Pet. 19a). That is precisely the case. The 1977 conditions directly prohibit performance and acts expressly authorized by the 1967 certificate and thus have the effect, in fact and in law, of altering and modifying the final 1967 certificate.

The "technical" point that this result was accomplished in a new docket rather than by reopening the original docket (Pet. 7a) has no bearing whatever upon the legal and factual result and impact. It is merely an argument that the Commission can do by indirection in a new docket that which it cannot do directly in the original docket.

The 1967 certificate, as amended on May 29, 1967, expressly authorized up to 82% of the total deliveries to Florida Power and Light Company (FP&L) to come from offshore sources, balanced over ten years, with *no* restriction as to source thereafter (R. 1202). The 1977 conditions bar *all* offshore sources for deliveries to FP&L where transportation to onshore locations must be authorized by the Commission. (Pet. 42a-43a). What is authorized and permissible one day becomes prohibited the next, and this is the reality of what is involved in this case.

The focus in *Seatrain* was directly upon such impact, not upon "technical" procedural defenses asserted by the ICC. There, as here, alteration and modification of performance authorized by a final certificate was prohibited. The "technical" procedural distinction asserted by the Commission thus is without merit, and the holding in *Seatrain* clearly applies.

2. Next, the Commission argues that the 1965 and 1967 certificate orders did not preclude the conditions imposed in 1977 (FERC Br., pp. 8-9). This is not correct, and the principle of administrative finality is fully applicable to the 1965 and 1967 certificates.

Those certificate orders contain all necessary findings under Section 7 of the Natural Gas Act as to the public convenience and necessity requiring, during the full term thereof, Amoco's sale to FGT and FGT's transportation of volumes sold by Amoco to FP&L. The certificates authorized the sale of the defined, fixed total quantity of 584,400,000 Mcf covered by the contract between Amoco and FGT (R. 433-436, 672), and the transportation by FGT of the defined, quantity to be sold by Amoco under its contract with FP&L (R. 415-416, 533-535, 540, 1148).

Findings and conclusions as to delivery of those total quantities were made under the Section 7 standard in 1965 and 1967, and sources for those total quantities were then authorized. The Commission recognizes that these orders became final (FERC Br., pp. 4, 5). Thereafter, the quantities and sources there authorized were not subject to the alterations and modifications attempted by the 1977 order without violation of the principle of finality and the *Seatrain* doctrine.

However, the Commission now erroneously states that the 1977 certificate "only involved new sources of gas" and "did not apply to gas sold or transported under the 1965 and 1967 authorizations" (FERC Br., p. 9). This simply is not so. The quantities involved are *portions* of the volumes sold and transported precisely as authorized under the 1965 and 1967 certificates. The 1977 proceeding did *not* involve new, additional quantities to be sold to FP&L; new, additional quantities to be transported by FGT; or new, additional demands for FP&L. All volumes are to be sold and transported under the unmodified contracts as approved by the Commission in 1965 and 1967.

All required findings under Section 7 as to those volumes and permissible sources of gas were made in the 1965 and 1967 certificates. Therefore, no matter how the

record is examined, the 1977 conditions are "inconsistent with the prior certificates" (Cf. FERC Br., p. 9) and have the legal and practical effect of barring performance authorized in 1967 and of unlawfully altering and modifying Amoco's rights under the prior certificate.

3. The Commission argues that this result is not precluded by the 1967 certificate (FERC Br., p. 9), but the argument has no valid basis.

Even if the Commission could review the additional transportation under the 1977 certificates, it could not ignore its prior findings and conclusions in final orders permitting the sale and transportation of gas to FP&L and expressly authorizing the use of offshore gas. The 1977 review necessarily had to be made in light of finality of the 1967 certificate and the impact of attempting to rewrite that certificate and change Amoco's rights thereunder. The limited additional transportation involved could be reviewed only in that context, and the Commission cannot make an end-run around finality and the *Seatrain* doctrine by arguing that it was free to ignore the legal effect of the 1967 certificate and the effect of the new conditions in altering and modifying the permitted performance of the 1967 certificate.

The Commission was not free, as it argues, to ignore the 1967 certificate and act as though it had no binding effect in the 1977 proceedings.

4. The Commission also argues that "boilerplate" language in its certificate orders, concerning no "prejudice" in future or pending proceedings, were a "reservation" of a right to modify the 1967 certificate or to disregard its finality and binding effect in 1977 (FERC Br., pp. 3, 4, 9).

This argument is flatly contradicted by Commission and judicial construction of such "boilerplate" language and clauses and is a *post-hoc* rationalization of counsel

not appearing in the orders on review and not a proper basis for upholding Commission orders. See *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974), and cases cited, 417 U.S. at 397.

In any event, the Commission has unilaterally and automatically inserted "boilerplate" language in Section 7 certificate orders for decades. See, *e.g.*, *Alabama-Tennessee Natural Gas Co., et al.*, 14 FPC 986, 999 (1955); *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, 34 FPC 897, 908 (1965). In one of the earliest producer proceedings before it, the Commission itself stated that it intended such language *only* to be " . . . a standard reservation of the Commission's unquestioned right under the Act, upon its own motion or upon proper complaint, *to inquire later into the reasonableness of rates* proposed to be charged by the producers." *Anthony J. Tamborello, et al.*, 14 FPC 123, 126 (1955), *reh. denied*, 15 FPC 1 (1956) (emphasis supplied).

As to judicial construction, such boilerplate language was included in the order reviewed in *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963). Nonetheless, the court held an order approving a settlement to be binding and controlling on the Commission despite such language.

The argument in the Commission brief is thus refuted by Commission and judicial construction of such clauses. If they had the meaning now claimed, no certificate issued under Section 7 of the Act would ever have finality or binding, controlling effect.[1] *Seatrain* and the principle of

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[1] In *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961), prior to issuing the certificate, the Board purported to reserve "jurisdiction" to make later modifications in the certificate. This Court held that it did not ". . . make any difference that the Board has purported to reserve jurisdiction prior to certification

finality of agency action would then be erased from the law.

5. As to the argument that the Commission's policy as to boiler fuel in the 1970's is a full justification for Commission action (FERC Br., p. 10), what the Commission has done is to apply that policy incorrectly and retroactively to a transaction finally approved in 1967 *after* consideration of boiler fuel use. The Commission then fully canvassed air pollution problems in Florida, benefits of the transaction to FGT's system, and benefits to FGT's customers and other Florida interests (R. 1168-1169).

The policy announced in the 1970's cannot be applied without consideration of evidence and without supporting reasons in specific cases. *Pacific Gas & Electric Company* v. *Federal Power Commission*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). The policy is not treated as conclusive, is but one factor to be considered in a balancing process, and is not applied without regard for evidence of particular circumstances. *American Smelting & Refining Company* v. *Federal Power Commission*, 494 F.2d 925, 944-946 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974). There is and can be no "flat rule" against boiler fuel use, and end use is but one factor to be considered under Section 7. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961). The "inferiority" of boiler fuel use depends upon record evidence and the particular circumstances. *City of Willcox* v. *Federal Power Commission*, 567 F.2d 394 (D.C. Cir. 1977); *Arkansas Power & Light Company* v. *Federal Power*

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to make summary modifications . . . ." (367 U.S. at 321). Despite the purported reservation, the Board, as a creature of Congress, was held bound by the statute (367 U.S. at 322). See also *Shell Oil Company* v. *Federal Energy Regulatory Commission*, 566 F.2d 536 (5th Cir. 1978).

Commission, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).[2]

Therefore, in this case, the general "policy" cannot lawfully supersede findings made in 1967 or override the controlling considerations of finality of that certificate or support unlawful attempts to modify its terms and deprive Amoco of its rights under that certificate.

6. In sum, no matter how the Commission's arguments are cast, the Commission cannot change the reality that the Commission has, in fact and legal and practical effect, altered and modified Amoco's rights under a final certificate. The decision below therefore plainly is in conflict with *Seatrain*, and that conflict should be reviewed by this Court.

II. *The Settlement Agreement.* The Commission further contends that the Fifth Circuit's decision is not in conflict with prior decisions as to the binding, controlling effect on the Commission of settlements approved by the Commission (FERC Br., p. 11).[3] The Commission's statements do not support the contention and are *directly* refuted by the contents of the 1967 Commission orders.

1. The Commission makes the strange statement that ". . . what controls is the Commission's approval of the

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[2] The Commission says that in view of changes in federal policy, Amoco as ". . . a certificate holder . . . ." can petition to have the conditions removed (FERC Br., p. 10 n.10). However, the transporting pipelines, not Amoco, are the certificate holders, and if the Commission took as long to act on such a petition as it did on the applications here involved, the issues would be moot before a decision would be made.

[3] As shown in the Petition (pp. 16-18), the Fifth Circuit decision is in conflict with *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *Continental Oil Company* v. *Federal Power Commission*, 373 F.2d 96 (10th Cir. 1967); *Tennessee Gas Pipeline Company* v. *Federal Power Commission*, 504 F.2d 199 (D.C. Cir. 1974).

settlement as embodied in the authorized certificate, not the settling parties' assumptions" (FERC Br., p. 11). Here, the approval *is* embodied in the certificate, and the substantive terms were *expressly* incorporated into the certificate by Commission order amending the certificate. Nothing could be plainer when the 1967 orders are read, and no "assumptions" are involved.

The certificate issued on March 1, 1967 contained the express condition limiting sources for deliveries to FP&L to no more than 85% from fields offshore Louisiana (R. 1171). Thereafter, in its order issued May 29, 1967 approving the settlement, the Commission made findings as to the substantive terms of the settlement, approved those terms, and *expressly* amended the certificate to provide ". . . that from the date deliveries commence through ten years from such date the proportions of the gas produced in the offshore fields (Federal Domain) of Southern Louisiana shall not exceed 82% of the total amount of gas produced in the South Louisiana area" (R. 1202). This last order thus not only embodied approval, but modification by the Commission of the certificate order to include substantive terms of the settlement.

Since the Commission agrees ". . . that what controls is the Commission's approval as embodied in the authorized certificate . . . ." (FERC Br., p. 11), upon reading the two 1967 orders, it must concede that the approval by the Commission was, in fact, expressly embodied in the May 29, 1967 order; that this case thus is *within* the rule that an approved settlement is binding and controlling on the Commission; and that the decision below is in conflict with decisions of the Fifth, Tenth, and District of Columbia Circuits.[4]

2. The Commission argues that the 1977 certificate did not modify the 1967 certificate (FERC Br., p. 11).

[4] See cases cited in fn. 3, *infra*.

As shown above, this simply is not so, particularly when the legal and practical effect and impact on Amoco's rights under the 1967 certificate are considered.

Simply put, one day Amoco is authorized to connect offshore sources to deliver to FP&L within the percentage limitation set out in the May 29, 1967 order amending the certificate; the next day, because of the 1977 order, Amoco is prohibited from connecting *any* offshore sources for deliveries to FP&L requiring transportation authorization.

This is a modification and alteration of the approved settlement and the May 29, 1967 order under any definition of those terms in the English language. It also is precisely the type of collateral, evasive change of an approved settlement condemned by the courts in holding the Commission bound by terms of a settlement previously approved by it.

3. The Commission also suggests language in the 1967 order purported to reserve "authority" as to future applications (FERC Br., pp. 11-12). As shown above, the "boilerplate" language relied upon by the Commission does *not* have the legal effect of such a blanket "reservation" to modify the terms of a final, approved settlement. Moreover, similar contentions by the Commission as to such "boilerplate" have been rejected in cases holding the Commission bound by an approved settlement.

In *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963), the settlement order contained language that it was "without prejudice" to future findings and orders in another docket, but the court held such language did not permit amendment or modification of the approved settlement by orders entered in that docket (306 F.2d at 354-358). Similarly, in *Continental Oil Company* v. *Federal Power Commission*, 373 F.2d 96

(10th Cir. 1976), the Commission relied upon its "boiler-plate" in a temporary certificate, but the court held that the language ". . . is simply 'boiler-plate' intended to prevent a certificate holder *from filing for a change of rate* during the life of a temporary certificate" (373 F.2d at 100, emphasis supplied). (See also *Continental Oil Company, et al.*, 28 FPC 1090, 1094 (1962), as to "boiler-plate" in the order approving the settlement). The courts thus hold that language such as that now relied upon by the Commission does not remove finality or permit subsequent modification by the Commission of an approved settlement.

4. Contrary to the Commission (FERC Br., p. 12), the 1977 order thus violates the "general rule" that settlements accepted by the Commission are binding upon it. The decision below presents a direct conflict with the holdings of the Fifth, Tenth, and District of Columbia Circuits and should be reviewed by this Court.

III. *The Section 7(b) Condition.* The unlawful condition in Ordering Paragraph (D) of the 1977 certificate order, requiring future "abandonment" authorizations under Section 7(b) of the Natural Gas Act, is defended by the Commission (FERC Br., p. 11 n. 11), but the effort is a failure.

1. To the extent that this condition may be intended to apply in *any* way to sources of deliveries to FP&L, the condition is patently unlawful. Amoco's sale to FP&L is not a "sale for resale," but is a direct sale not subject to Commission jurisdiction under the Act (Section 1(b), 15 U.S.C. § 717(b)). Section 7(b) of the Act thus has *no* applicability whatsoever to Amoco's sale to FP&L.

2. The content, terms, and conditions of the 1965 order granting Amoco a certificate to sell to FGT (R. 1128-1133) show that the provisions of Section 7(b) are not applicable to sources for deliveries to FGT.

The certificate authorized the sale only of the fixed, finite quantity of 584,400,000 Mcf, nothing less and nothing more (R. 1128). In its order, the Commission discussed the nature of such "warranty contracts," stating ". . . that existing as well as yet undiscovered fields may be attached to a pipeline *and abandoned without regulatory action in future years*" (R. 1130, emphasis supplied). The certificate authorized the sale in accordance with the quantity and terms of the contract.

In light of this recognized inapplicability of Section 7(b) as to "abandonments" in future years, the Commission imposed the condition only requiring Amoco to file statements ". . . at such time as there is a *cessation of deliveries* of gas from any particular field notifying the Commission of the identity of the producers involved and the occurrence of *cessation of deliveries.*" (R. 1133, emphasis supplied). The Commission thus recognized that the certificate is finite in terms of the fixed quantity and that future disconnections of fields, during and at completion of delivery of that 584,400,000 Mcf finite quantity, would *not* be subject to the requirements of Section 7(b) of the Act.

The Commission is authorized to issue such limited-term certificates under the Act. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 239 F.2d 97 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 944 (1957); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960). The Commission also may permit "pregranted" abandonment as to future cessation of sales. *Federal Power Commission* v. *Moss*, 424 U.S. 494 (1976).

Under these interpretations of Section 7 of the Act, the Commission has issued limited certificates, as it did in the 1965 order, to which future procedures under Section 7(b) of the Act are not applicable. The Amoco 1965 certificate, authorizing a sale of a fixed quantity of gas

without commitment or dedication of specific properties, thus differs from certificates unlimited as to quantity or duration issued for conventional gas sales contracts committing and dedicating specific properties. Only such conventional contracts and such unlimited certificates were involved in the three cases cited by the Commission (FERC Br., p. 11 n. 11), and application of Section 7(b) in those cases has no revelance at all to the Amoco 1965 certificate or the issues in this case.

3. Despite the plain language in the 1965 order, the Commission argues that Commission reference to Part 157 of the Regulations in one ordering paragraph in that order meant that Section 7(b) requirements as to deliveries were deemed applicable in the future to the sale (FERC Br., p. 11 n.11).[5]

Part 157 of the Regulations contains extensive, lengthy regulations covering all or part of thirty-seven pages of fine print in the Code of Federal Regulations (18 CFR §§ 157.5, *et seq.*). The subjects covered include applications for certificates and abandonment by pipeline companies, abbreviated applications, applications covering acquisitions, applications for temporary certificates, applications for certificates by independent producers and gatherers, applications for amendments of certificates, applications for abandonment, exemptions from certificate requirements, and other subjects.

An obscure reference to such a grab-bag of regulations could hardly be notice or a holding that Section 7(b) requirements applied in the future, despite the language to the contrary in the Commission's order. Indeed, some parts of Part 157 would apply, such as provisions applicable to a future application to amend the certificate,

[5] The order also provided for future applicability of Section 4 and Part 154 of the Regulations (R. 1132). These apply to future increases in rates.

but others clearly do not. Among those which do *not* are the sections relating to applications for abandonment.

Significantly, the language relied on by the Commission contains an express reference to Section 4, concerning future rate increases, but *no* reference whatever to Section 7(b) (R. 1132). The pertinent provision states:

> "(C) The grant of the certificate issued in paragraph (A) above shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas *lar customres involved imply approval of all of the*
>
> Nos. CI65-37, CI65-95, CI65-101, CI65-101, CI65-374, CI65-661, CI65-726, CI65-847, CI65-956, CI65-1145, CI65-1314, and CI65-122.
>
> Act or of Part 154 or Part 157 of the Commission's Regulations thereunder * * *" (R. 1132).

The omission of reference to Section 7(b) is in *direct* contrast to the language in ordering paragraphs of orders issuing certificates for conventional sales which contain an *express* reference to Section 7(b). The *differing* language used in certificates for conventional sales by producers reads:

> "(C) The grant of the certificates issued in paragraph (A) above shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act or of Part 154 or Part 157 of the Commission's regulations thereunder, * * * *Nor shall the grant of the certificates aforesaid for service to the particular customers involved imply approval of all of the terms of the respective contracts, particularly as to cessation of service upon termination of said contracts, as provided by Section 7(b) of the Natural Gas Act* * * *" (Emphasis supplied).[6]

[6] This express reference to Section 7(b) thus appears in the order issued October 27, 1964 in Docket Nos. G-2810, *et al.*, issuing a certificate to Amoco for a conventional sale in Docket No. CI65-122. The same express reference to Section 7(b) appears in the language uniformly used in orders issuing certificates for conventional sales. See as examples orders issuing certificates to Amoco in Docket Nos. CI65-37, CI65-95, CI65-101, CI65-122, CI65-374, CI65-661, CI65-726, CI65-847, CI65-956, CI65-1145 and CI65-1314.

The first sentence in ordering paragraph (C) in these orders applicable to conventional sales thus is identical to the first sentence in ordering paragraph (C) in the 1965 order issuing Amoco's certificate. However, the additional sentence in orders applicable to conventional sales, underscored above, contains the *express* reference to Section 7(b) which does *not* appear in the 1965 order granting Amoco's certificate (R. 1132). Had the Commission so intended Section 7(b) to apply in the future to Amoco's sale to FGT, it thus would have said so, as it does in orders applicable to conventional sales.

The general reference to all of Part 157, in light of the order as a whole, therefore does *not* have the meaning now asserted by the Commission. The controlling ordering Paragraph (A) issued a certificate ". . . *as described above* and as more fully described in the application, supplements, and exhibits in this proceeding" (R. 1131, emphasis supplied).

4. The 1965 certificate order covering Amoco's sale to FGT thus authorized cessation of deliveries from specific fields without an application under Section 7(b). The 1977 certificate order now on review purports to modify that authorization. The 1977 certificate order thus violates the principle of finality and conflicts with the *Seatrain* holding, and this issue also should be reviewed by this Court.

IV. *Finality of Certificates.* Throughout, the Commission's brief studiedly ignores the actual impact of the new 1977 certificate conditions upon Amoco's performance as authorized by the 1967 certificate and Amoco's rights thereunder to sell and deliver from offshore sources to FP&L. Reality and practical adverse impact on performance are swept aside, and the arguments presented are inconsistent with the record and in direct conflict with the content of the Commission orders involved.

However, as Amoco shows in the Petition (pp. 14-16, 17-18), the principles of finality of certificates, of adherence to the *Seatrain* holding, and of binding effect of approved settlements are of utmost importance to all operations and planning of all companies regulated under the Natural Gas Act. As stated in *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963), a settlement agreement ". . . should stand for what it says" (306 F. 2d at 348); and, as stated in *Seatrain*:

> "The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole *or in part* except as specifically authorized by Congress." (329 U.S. at 432-433, emphasis supplied).

Amoco urges that the questions presented be reviewed in light of the actual content of the Commission orders and the substantive impact of the Commission's actions and not in terms of the strained, erroneous arguments submitted on behalf of the Commission.

CONCLUSION

For the reasons stated in this Reply Brief and in the Petition, the petition for a writ of certiorari should be granted.

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